

MEDIA POLICY FRAMEWORK FOR ZIMBABWE

1. Introduction

Freedom of expression plays a critical role in fostering democracy and respect for human rights. It serves as an instrument for the free exchange of ideas, strengthens democratic processes and offers citizens an indispensable tool for informed participation. It is indeed the cornerstone upon which the very existence of a democratic society rests.

A free and independent media is therefore crucial to the development of democracy in any country. Without a vibrant media, the public's right to receive information on matters of public interest from a variety of sources cannot be fulfilled and the free and open debate that is indispensable to the development of public policy cannot take place.

The media investigate and report on issues of public interest, particularly relating to the political process, the conduct of public officials, the positions taken by government and the opposition, among other things. In addition, the media provide a broad spectrum of entertainment and can play an important role in the provision of educational services. It is probably fair to say that the vast majority of people gain almost all of their knowledge about matters outside their own day-to-day lives from the media. If Zimbabwe is to develop as a free, open and democratic society and as a prosperous country, it is therefore critically important that a climate be created within which a free, independent and pluralistic media can flourish.

2. Fundamental Principles

There is no need to re-invent the wheel when developing a media policy for Zimbabwe. It should be informed by existing international, continental and regional standards and principles.

As early as 1948, the United Nations adopted the Universal Declaration of Human Rights. Article 19 says:

Everyone has the **right to freedom of opinion and expression**; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

In 1991 Zimbabwe ratified the International Covenant on Civil and Political Rights. It says in its Article 19 that everyone shall have the right “to hold opinions without interference” and to “freedom of expression” which shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice. ”

Also in 1991, the United Nations Educational, Scientific and Cultural Organisation UNESCO adopted the Windhoek Declaration on Promoting an Independent and Pluralistic African Press. The declaration says that the “maintenance and fostering of an independent, pluralistic and free press is essential to the development and maintenance of democracy in a nation and for economic development.”

The right to freedom of expression is also protected at the level of the African Union (AU) of which Zimbabwe is a member state. In 2002 the AU’s Commission on Human and Peoples’ Rights adopted the Declaration of Principles on Freedom of Expression in Africa which provides useful benchmarks for any media policy in Africa. It states that:

- freedom of expression “places an obligation on authorities to take positive measures to promote diversity (Article III)”;

- “the right to information shall be guaranteed by law” (Article IV);
- “community and private broadcasting should be encouraged” (Article V);
- “state and government controlled broadcasters should be transformed into public service broadcasters” (Article VI);
- “broadcasting and telecommunications regulatory authorities should be independent and adequately protected against interference particularly of a political or economic nature” (Article VII);
- “effective self-regulation is the best system for promoting high standards in the media” (Article IX).

The right to freedom of expression is not absolute. International law, international and regional treaties as well as national constitutions recognise that freedom of expression may be restricted. The limitations must, however, remain within parameters strictly defined by international documents.

The Declaration of Principles on Freedom of Expression in Africa says in its Article II:

1. No one shall be subject to arbitrary interference with his or her freedom of expression,
2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.

The second part of this article provides the so-called three-part test to determine whether any restriction to freedom of expression is justified. To pass this test

- limits on freedom of expression must be based on a law enacted by parliament and cannot be imposed by a presidential decree or in a similarly undemocratic fashion;
- they must protect a legitimate interest, for example the right to privacy; and
- restrictions on freedom of expression must be necessary in a democracy society, i.e. essential to address a pressing social need; the restriction must

be proportionate to the aim, and the reasons given to justify the restriction must be relevant and sufficient.

This test could also be applied to existing and future constitutional provisions in Zimbabwe. While the current constitution broadly guarantees the right to freedom of expression, it also lists a number of exceptions. Many of the justifications given for a possible limitation of the basic right are quite vague, referring to undefined concepts such as “economic interests of the state” or simply “interests of the state”.

In 2011 the United Nations’ Human Rights Committee underlined the importance of a very narrow definition of such limitations and pointed out that they may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.

An example of regional constitutional provisions in line with these principles can be found in the 1996 constitution of South Africa. It contains the following guarantee of freedom of expression which is regarded as one of the most progressive and democratic provisions worldwide:

Everyone has the right to freedom of expression which includes:-

- freedom of the press and other media;
- freedom to receive or impart information or ideas;
- freedom of artistic creativity; and
- academic freedom and freedom of scientific research.

The right does not extend to:-

- propaganda for wars;
- incitement of imminent violence; or
- advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.

In order to comply with international standards, the freedom of expression guarantee in the new constitution should include express guarantees of media freedom, access

to information, freedom of artistic creativity and academic freedom. Any restrictions on the right to freedom of expression should be provided for by law, serve a legitimate interest and be necessary in a democratic society.

3. Legal Framework

In general, media-specific legislation is not necessary in a democracy. In the SADC region, most countries do not have specific media laws. South Africa has no press law. Zambia and Namibia still have old publication acts from the pre-independence era on their statute books but they are no longer being enforced.

3.1. Media in general

- There shall be no statutory regulation of the media. Media practitioners shall have the right to develop their own codes of ethics and establish self-regulatory systems.
- There shall be no state registration system for journalists and print media outlets.
- The media shall not be subject to special restrictions of what may be published over and above restrictions found in laws of general application.

3.2. Broadcasting

An Independent Broadcasting Regulator shall be established and shall promote the creation of a diverse public, private and community broadcasting sector.

The setting up of such a regulator and the regulation of broadcasting in general shall be governed by current international best practices in accordance with the following principles and guidelines:

- The independent broadcasting regulator shall be protected against government or commercial interference by, among other things, explicit guarantees of independence, an open and transparent process of nomination and appointment of members, rules on conflicts of interest (commercial and political) and adequate and protected sources of funding.
- The regulator shall have power to allocate licences along with appropriate frequencies to all broadcasters.
- Licensing processes shall be fair and transparent and shall be based on the need to promote pluralism in the broadcasting sector, as well as the need for equitable allocation of licences to all tiers of broadcasting.
- Broadcasters themselves should develop codes of conduct and set up internal mechanisms for dealing with infringements of the code and complaints from the public. The independent broadcasting regulator could set up a complaints commission as an appeals body.

3.3. Access to Information

Access to Information legislation shall be passed that complies with the Declaration of Principles on Freedom of Expression in Africa outlined in Article IV. It starts off by spelling out this basic premise:

Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

The Declaration states that “everyone has the right to access information held by public bodies”, for example ministries. “Any refusal to disclose information shall be subject to appeal to an independent body and/or the courts.”

The Declaration also protects whistle-blowers by saying that “no one shall be subject to any sanction for releasing in good faith information on wrongdoing ... save

where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society.”

3.4. Defamation and other content restrictions

The rules relating to defamation shall be revisited to bring them into line with international standards. The Declaration of Principles on Freedom of Expression in Africa, for example, stipulates that

- no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
- public figures shall be required to tolerate a greater degree of criticism; and
- sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.

The UN’s Human Rights Committee says that “all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.”

4. Legislation to be amended or repealed

Present-day Zimbabwe has a legacy of legal provisions that restrict freedom of expression far beyond the levels permitted under international law. It is crucial that all of these laws be reviewed and either repealed or replaced with laws that meet international standards.

4.1. Access to Information and Protection of Privacy Act (AIPPA) 2002

4.1.1. Licensing of media and journalists

AIPPA includes a number of provisions that restrict freedom of expression:

- AIPPA requires all “mass media owners” who “carry on the activities of a mass media service” to obtain a certificate of registration from the Zimbabwe Media Commission (ZMC). Failure to comply with this requirement is a criminal offence and attracts a fine or imprisonment for up to eighteen months.
- The law gives the ZMC broad powers to terminate or suspend the activities of a mass media service. The ZMC is also entitled to impose conditions for the accreditation of a journalist or withdraw such accreditation.
- In addition, AIPPA can impose sanctions against journalists for what is termed
- abuse of journalistic privilege”. For example, if a journalist publishes “any statement” that threatens “the interests of defense, public safety, public order, the economic interests of the state, public morality, public health; or is injurious to the reputation, the rights and freedom of other persons” he or she could face a fine or imprisonment of up to two years.

The requirement for mass media services to register with a government controlled body (which, by implication, also enables the government to de-register them) falls foul of international standards and guarantees.

The system established by AIPPA is clearly designed to exercise massive state control over the media in the country. It is not in line with international standards and best practices and contravenes the requirement that limitations of freedom of expression must be necessary in a democratic society.

There is no need for a specific media registration law. Publishing companies, like any other enterprise, should be subject to the provisions of the Companies Act.

A licensing requirement for journalists is illegitimate and contravenes regional, continental and international standards. The UN's Human Rights Committee says:

Journalism is a function shared by a wide range of actors, including professional full time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3 [which allows for certain limited restrictions of freedom of expression].

Provisions requiring compulsory registration / accreditation for journalists **should be repealed.**

4.1.2. Access to Information

AIPPA both gives and takes away or neutralises the right to access information. While one section grants this right, a number of others prescribe information that may not be accessed and yet another gives heads of public bodies the power to refuse a request for information if "it is not in the public interest."

The absence of a legal guarantee of access to information allows government to dominate the flow of official information. It can choose not only which information to release but, and almost as importantly, whom to release it to.

AIPPA in its entirety is not redeemable as its main thrust is to water down and limit the right to freedom of expression. The act therefore needs to be repealed and a new access to information law has to be passed. The new law should follow the guidelines set by the Declaration of Principles on Freedom of Expression in Africa set out above.

The **right of access to information** should be included in the constitution.

4.2. Amendment 19 to the Constitution of Zimbabwe

Section 39 of Constitutional Amendment 19 reinforces the disciplinary powers of the ZMC and thus allows for continued statutory interference in the freedom of the media. The existence of a statutory “disciplinary” body for the media runs counter to the Declaration of Principles on Freedom of Expression in Africa.

The regulation of the media is best conducted by the media themselves. The provisions in Constitutional Amendment 19 should be revisited. A new Media Policy should seek to enable independent and professional journalism rather than restrain it through control by statutory bodies.

4.3. Criminal Law (Codification and Reform) Act (2004) as amended in March 2007

4.3.1. False news and insult of the President

The Act makes it an offence to publish a statement which “is ... false” and could, among others, be “adversely affecting the defense or economic interests of Zimbabwe”, threatening imprisonment of up to 20 years.

Another section deals with “undermining the authority or insulting the President” It prohibits the making, publicly and intentionally, of any “false” statement (including an act or gesture) about or concerning the president if the person knows or realizes that there is a risk or possibility of engendering feelings of hostility towards or causing hatred, contempt or ridicule of him, whether in his official or personal capacity. A violation of this provision attracts a jail term of one year or a fine, or both.

The provisions cited above should be repealed altogether. They do not serve any legitimate aim of the state or serve any pressing social need and are not necessary in a democratic society.

4.3.2. Criminal defamation

The same act makes it a criminal act to publish a “statement” which is “false” and “causes” serious harm to the “reputation” of a person, punishable with a fine and/or imprisonment for up to two years.

There is growing international consensus that criminal law provisions are not the right response to defamation. New democracies need a media that is free to criticise public policies and politicians without fear of imprisonment or a harsh fine. The reputation of persons and their privacy can be protected adequately through civil law.

Criminalisation of defamation is an unjustifiable restriction to the right to freedom of expression: it does not address any pressing need of society nor does it serve any legitimate aim of the state. Criminal defamation provisions should therefore be repealed and replaced with appropriate civil defamation laws.

4.4. The Official Secrets Act

This is a pre-independence statute dating back to 1970 (and amended in 2004). Under the heading “Espionage” the act provides that “any person who, for any purpose prejudicial to the safety or interest of Zimbabwe obtains, collects, records, publishes or communicates to any person ... any information which is calculated to be or which might be or is intended to be useful directly or indirectly to the enemy”, may be imprisoned for up to 25 years.

“Enemy” is defined as a “hostile organisation” which is declared as such by the President.

The “interest of Zimbabwe” is a very broad term and thus open to abuse. The same applies to the definition of an “enemy”.

The provisions cited here should be revisited to ensure compliance with international standards.

4.5. Interception of Communication Act 2007

This Act empowers government to open postal mail, eavesdrop on telephone conversations and intercept faxes and e-mails.

The right to privacy is a fundamental right protected not only by the national constitution but also by international human rights law. The International Covenant on Civil and Political Rights in particular prohibits subjecting any person to “arbitrary or unlawful interference with his privacy, family, home or correspondence ...”. This Act discourages citizens from exercising their right to free expression through mail, telephone conversations or the internet.

The Interception of Communication Act 2007 is neither necessary nor does it serve any legitimate interest. It is a very serious encroachment on the right to protection of privacy and the rule of law and must be repealed.

4.6. The Broadcasting Authority of Zimbabwe (BAZ)

4.6.1. Appointment of the board of the Authority

The Authority is established by the Broadcasting Services Act 2001 (amended in 2003) as the regulatory and licensing authority for the sector. The BAZ has the power to determine who is to be issued a licence and when, to set terms and conditions for such licences, and to decide on the amendment, suspension and cancellation of licences.

The public has no say in the process of appointing members of the BAZ board. Instead the President has an almost free hand to select members of his or her choice. Although he or she has to consult with the minister and the parliamentary committee the President is not obliged to obtain their consent.

These provisions thus do not comply with the Declaration of Principles on Freedom of Expression in Africa which states:

1. Any public authority that exercises power in the areas of broadcasting or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.
2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society and shall not be controlled by any particular political party.
3. Any public authority that exercises powers in areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.

The broadcasting regulations also contravene the 2002 SADC Declaration on Information and Communications Technology, which establishes a clear separation of powers between government, regulators and service providers, with government being responsible for ensuring a conducive policy framework, independent regulators being responsible for licensing and a multiplicity of providers in a competitive environment responsible for providing services.

A new Broadcasting Services Act must establish a regulatory body which is impartial and independent from political and commercial influence. The law should provide that the independent regulator shall be responsible for licensing broadcasters as well as the allocation and distribution of the frequency spectrum.

The appointment procedure for board members should be democratic and fully transparent, and allow for public input. Board members should not be appointed by the President or government ministers and rules should be drawn up to prevent conflicts of interest.

4.6.2. Licensing

The state-controlled Broadcasting Authority of Zimbabwe regulates the entire licensing system. This is incompatible with international standards. The Declaration of Principles on Freedom of Expression clearly stipulates that an independent regulatory body be responsible for issuing broadcasting licences and for ensuring observance of licence conditions.

The new broadcasting legislation should establish a clear licensing framework, set out a licensing process and require that the spectrum be utilized to fulfill the public's right to receive information from a variety of sources.

4.7. Zimbabwe Broadcasting Corporation (ZBC)

The ZBC is wholly controlled by the Minister of Information who appoints members of the board and issues regulations/directions to the board and management of the corporation. It is therefore a state-controlled broadcaster serving the interests of the state and not a public broadcaster. In terms of the ZBC (Commercialisation) Act 2001, the State is the sole shareholder of the ZBC, with shares being held by persons nominated by the minister after consultation with the President.

The Act expressly mandates the ZBC “to give priority to serving the needs of the state, to the extent that it is compatible with sound business practice to do so”.

Thus, the national broadcaster in Zimbabwe is both state-owned and state-controlled, and mandated to serve the state’s interests. Government appoints the ZBC Board. There is no process of public nomination or any form of public involvement in the selection of the board. Editorial independence at the ZBC is non-existent. All this is clearly incompatible with the Declaration of Principles on Freedom of Expression in Africa which states:

State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

- public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- the editorial independence of public service broadcasters should be guaranteed;
- public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.

The ZBC Commercialisation Act should be repealed and replaced by a new Zimbabwe Broadcasting Corporation Act whose objective would be to insulate ZBC from any political and commercial influences and enable it to fulfill the mandate of public broadcasting: made for the public, financed by the public and controlled by the public. The new Act must provide a legal structure which sets up the ZBC as a corporation in its own right. Its independence must be guaranteed in the new constitution.

A new ZBC Act should prescribe that members of the ZBC Board be reasonably representative of society at large and have the necessary expertise to fulfill their duties. Care must be taken to ensure that persons with vested interests of a political nature, i.e. office bearers with the State or political parties as well as those with financial interests in the broadcasting industry are disqualified. The appointment procedure must be open and transparent and free from political interference.

A new ZBC Act should unequivocally protect the independence of the board, stating that nobody has the right to influence the work of the board in any way. The role of the board should be clearly spelt out in the Act, its main responsibility being to ensure the protection of ZBC against any outside interference or attempt to compromise its independence.

The main sources of funding for the ZBC shall be government grants, licence fees and income from advertising/sponsorships. The setting of licence fees and the development of guidelines and conditions on advertising and programme sponsorship should be the competency of the independent regulator. Levels of grants to be requested from government as a subsidy should be determined by the board and approved by Parliament as a charge on the Consolidated Revenue Fund.

4.9. Zimpapers

At present most print media in Zimbabwe are controlled by government or a single political party. This is not consistent with the principles of the right to freedom of expression which oblige governments to take measures to create an enabling environment in which a free, independent and pluralistic media can thrive. The status quo in Zimbabwe fails to conform to international standards and has no place in a democracy.

All newspapers published by Zimpapers should be transferred to a public legal entity accountable to the public at large through a board protected against political or economic influence. The board should be appointed in an open and transparent manner involving the participation of civil society.

In the longer term this public legal entity should be transformed into a public company in which members of the public are entitled to hold shares. The statutes of the company should clearly prescribe the number of shares any individual may hold to prevent a monopoly.

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A GUIDE FOR MEDIA LAWS IN ZIMBABWE



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